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Executive Order 14438 Poses New Issues for Contractors Responding to Congressional Inquiries

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What happened

On Friday, November 20, 2026, President Donald Trump issued Executive Order 14438, "Protecting the Executive's Privileges and Enhancing Efficiencies in Federal Contracting," targeting federal contractors and subcontractors. The EO orders federal contractors to "notify the White House and the contracting agencies of any pending or future congressional request respecting the contractors' communications or work with the executive branch." The EO states that if the White House or a contracting agency determines these communications "are protected by executive privilege" and instructs a contractor to withhold those communications, the contractor must do so. If a contractor does not follow this consultation and withholding process, then the EO threatens "the potential termination or cancellation of contracts and the potential debarment or suspension of contractors."

Why the EO happened

With the recent midterm elections, Congress overwhelmingly flipped to Democratic control. This EO appears to be a direct response to those election results. According to EO 14438, the White House is concerned that "congressional leaders have threatened to intrude on [] Executive prerogatives by seeking confidential executive branch information from agencies and harassing private companies that contract with the Federal Government." The White House claims this EO is necessary to protect the "executive branch's interests and positions," and to avoid disclosure of confidential information. Democrats have already announced plans to conduct broad and aggressive congressional oversight of potential waste, fraud and corruption in the federal contracting process.

What does the EO mean

The EO states that it applies to every federal contractor and subcontractor and requires them to consult with their contracting agency and the White House before disclosing communications between the contractor and the executive branch or before disclosing work done for the federal government. The stated reason for consultation is to provide an ability for the executive branch to determine whether executive privilege applies to any of these communications or documents before they are produced to Congress. The EO states that if the contractor does not adhere to the EO's requirements, the contractor risks losing its current federal contract and future opportunities to contract with the federal government. The notification requirement states that it applies immediately to pending as well as future congressional requests. The EO also tells agencies to hold prime contractors responsible for ensuring that subcontractors working on federal contracts comply.

The EO is written broadly and raises numerous questions, including whether it applies when the requested information is in the possession of a federal contractor but unrelated to a federal contract – for example, communications between the employees of a federal contractor and the executive branch even if they are not tied to the discussion of a contract.

What happens next

Executive Order 14438 is unprecedented, and its consequences are still being understood. It is new, novel and broad in nature and scope. As the EO notes, the Office of Management and Budget is developing "guidance on how agencies can ensure that contractors are complying with the [EO's] requirements."

Further, in the context of the Office of Legal Counsel (OLC) opinion issued in August 2026, it is possible the executive branch is contemplating applying privilege claims much more broadly. The OLC opinion stated, "[e]xecutive privilege can apply to presidential communications with private advisers so long as the communications relate to official presidential decisionmaking, involve or reflect communications with the President or his direct advisers, and are confidential." If the Trump administration intends to apply the EO in the context of the OLC opinion, this will create complex legal questions requiring consultation with counsel.

How the EO will be interpreted by the administration is not yet known, and reactions to it are still forthcoming. There will likely be legal challenges to stop its application, and there are significant practical challenges to its implementation. We are in close contact with executive branch officials to better understand the EO's application and will continue to monitor the situation.

Senator Maggie Hassan, incoming Democratic Committee Chair for the Senate Homeland Security and Government Affairs Committee, responded to the EO with a statement to federal contractors demanding compliance: "Every federal contractor should know that this Executive Order does not override their obligation to comply with Congressional requests for information or subpoenas. Congress will get the information that it needs, and, if necessary, we will use every authority available to us to get it."

The executive branch's application and enforcement of this EO in the face of aggressive scrutiny from congressional Democrats with subpoena and contempt authority potentially creates a high-risk situation for federal contractors and subcontractors who will be caught in the middle. Navigating these competing co-equal branches of government in the face of these novel issues will be challenging.

Cooley special counsel Umer Chaudhry also contributed to this alert.

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